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Requiring and Enforcing Drought Conservation Plans

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Here in Austin, many Cap Metro buses have been emblazoned with ads reminding locals that Stage 2 watering restrictions remain in effect. The ads feature big shapes and bold colors that seem to draw from the same palette that the Disney Channel does. But for all the aesthetic flourishes and visual fun, the phrase “Stage 2” stands out as something bureaucratic, a regulatory conception, a child born of documents dense and dry.

Which it is.

The Austin Water [website](#) explains: “Austin Water implemented Drought Response Stage 2 Regulations last September and remains in effect. This is in response to combined storage in lakes Travis and Buchanan reaching the 900,000 acre-foot trigger outlined in the Drought Contingency Plan.”

Since 1997, the Texas Water Code has required each wholesale and retail public water supplier (such as Austin Water) and irrigation district to prepare two related documents – a “water conservation plan” (WCP) and a “drought contingency plan” (DCP).

A WCP is a “strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water.”

A DCP is a “strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies.” In short, the WCP provides a general-purpose plan for reducing water usage while the DCP offers a targeted plan for managing drought impacts.

In the final week of August 2013, the U.S. Drought Monitor [classified](#) 87.88 percent of Texas as being in drought. (This is progress: the portion of the state in drought had declined a full 1.05 percent from the week before.) It is doubtful that 87.88 percent of the state has implemented DCPs.

For every Austin, there are many more non-Austins, as all those who devote their lives to keeping Austin one thing or another ([affordable](#), [beautiful](#), and even [beard](#)) will passionately vouch. During the legislative session earlier this year, the Natural Resources Committee observed in a report that “when a recent state of disaster due to drought conditions was declared, only a fraction of applicable entities in the disaster areas reported that they were implementing mandatory restrictions as part of their drought contingency plans.”

The reason? The committee report could only cite to unattributed “speculat[i]ons” that this lack of reporting could be due to entities choosing to implement their water conservation plans instead.”

This despite the repeated efforts of the legislature to nudge local governments into adopting and implementing effective DCPs. In 1999, the capitol mandated that, when the governor declares a county to be a disaster area because of drought, all entities in that county that are required to prepare WCPs or DCPs must “immediately implement” their WCPs *or* DCPs.

In 2003, the legislature amended the statute governing DCPs – Water Code § 11.1272 – to require that, by May 1, 2005, all DCPs “include specific, quantified targets for water use reductions to be achieved during periods of water shortages and drought.” This revision encouraged water suppliers to prepare DCPs that were meaningful and not merely paper exercises; but it allowed suppliers to set their own targets and made clear that the targets would not be enforceable requirements.

Since May 1, 2005, TWDB has mandated that all DCPs submitted with loan applications “include specific, quantified 5-year and 10-year targets for water savings ... Targets must include goals for water loss programs and goals for municipal use in galls per capita per day.” But as in Water Code § 11.1272, applicants retain the discretion to establish their own targets.

In 2011, the legislature enacted Water Code § 11.053, which authorized the TCEQ’s executive director to enforce senior water rights during droughts and other emergencies by suspending junior water rights. TCEQ promulgated regulations under the statute allowing the executive director to exempt certain municipal and electric users from suspension orders. The executive director must consider whether the users have implemented WCPs and DCPs and may require that users implement them as a condition of exemption – creating an impetus for water supplies to develop WCPs and DCPs.

Despite this, few water suppliers have complied with the WCP and DCP requirements. And so, in its session earlier this year the legislature enacted [H.B. 3604](#), which amends Water Code § 16.055 to require that, when the governor declares a disaster area, water suppliers “immediately implement” both WCPs *and* DCPs.

If a water supplier violates this requirement, the TWDB *may* notify the TCEQ. Although the TCEQ generally does not have authority to assess administrative penalties for violations of statutory water rights or planning requirements, H.B. 3604 expressly permits the TCEQ to enforce the disaster area requirement through injunctions and administrative penalties. Finally, TCEQ has a DCP stick to go with the carrots.

In somewhat related bill, the legislature enacted [S.B. 654](#), which empowers municipalities to bring civil actions against individuals who violate “water conservation measures, including water [restrictions](#).” The municipalities can bring the actions in civil court or in quasi-judicial processes such as municipal courts or commissions.

Until its passage, municipalities could only enforce violations through criminal prosecutions. According to S.B. 654 supporters, criminal prosecutions drained time and resources by requiring municipalities to pull personnel from active field service in order to provide testimony and other litigation support. And criminal suits were [more vulnerable](#) to being dismissed on legal technicalities than similar civil suits would have been.

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